

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 3437 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

=====

1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

HASN KAMAL ATAMPRAKASH GROVER

Versus

STATE OF GUJARAT

Appearance:

MR KJ SHETHNA for Petitioner

Mr. P.G. Desai, Public Prosecutor for Respondent No.1

NOTICE SERVED for Respondent No. 2

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 21/04/99

ORAL JUDGEMENT

The opponent No.2 filed the FIR in Umra police station against the present petitioner alleging that the petitioner committed the offences punishable under Section 465, 468, 471, 406, 420, 506(2) of the Indian Penal Code by forging the document, using the forged document as genuine document, giving threat etc. Having come to know about the complaint lodged against him initially with Mahidharpura police station the petitioner by this application prays to quash the FIR as well as the

cognizance taken by the Judicial Magistrate (FC), Surat, invoking the powers under Section 482 of the Criminal Procedure Code.

2. In short, it is the case of the respondent No.2 that within the local limits of Village Radhu in Choryasi Taluka there is the lands bearing Survey No. 3/1 & 5 which are divided into several plots for the use of Harekrishna Group Housing Society. The plot No.40 thereof is allotted to him and he is in possession thereof. A sale-deed is executed in his favour. He has paid the consideration of Rs. 49,950/- to the petitioner. Formerly the lands belonged to Ranchhodbhai Keshubhai, Mulji Valji and others. The petitioner did not have any right, title and interest in that plot. However the petitioner executed the sale-deed as the power of attorney holder of Mulji Valji & others. He was knowing that the lands were reserved by Government for Surat Urban Development Scheme, and so sale was not permissible in law. Having come to know about reservation, when respondent No.2 met the petitioner, it was made clear that for getting the lands released, necessary steps were being taken. He then met the petitioner for many times. When he last met the petitioner, he was asked not to go to him again, the sale was executed, what more then was required to be done. He was then threatened with his kidnapping & murder engaging goons & gunmen if he again dared to go to him in this regard. By way of an ultimatum, he was also asked to leave Surat within a week. The petitioner, thus, forged the document and cheated him. He also committed the offences of breach of trust and criminal intimidation. Mustering up courage the respondent No.2 initially went to Mahidharpura police station and lodged F.I.R. against the petitioner qua above stated offences. The F.I.R. was then forwarded to Umra police station having jurisdiction. After the police investigation was over, a chargesheet against the petitioner is filed in the Court of the Judicial Magistrate (F.C.), Surat. The cognizance is taken and process against the petitioner is issued. Having come to know about the same, the petitioner has filed this application for the aforesaid relief.

3. It is the say of the petitioner that he is not the criminal, he is a peace-loving citizen. He is a successful builder having good reputation in the society. He is having lucrative business. His competitors envy his sound position and prosperity. They had determined to balk and vanquish him so that he the checkmated-petitioner might experience serious setback & downfall in his field. It is also his say that for the

last few days he had to come in conflict with Assistant Commissioner of Police Shri P.C. Thakur, who bred severe-hostility. The Assistant Commissioner of Police being vindictive by way of retaliation, planned to ruin him. The A.C.P. used to bully by several ploys, engaging emissaries. The complaint is the result of the ill-will of the Police Commissioner, and protracted battles, as well as the conspiracy the ACP has hatched with others, so as to cause the petitioner to succumb to unjust demands. Any-how Mr. Thakur wants to put the petitioner behind the bars if required misusing the powers. The complaint filed is nothing but the abuse of the process of law. Reading the complaint it would appear that case for no offence even prima facie is made out, but to wreck vengeance the complaint is filed. Against him similar type of complaints are also lodged with Umra police station. To harass him the whole case is concocted. The land in question was initially placed under reservation by the Surat Urban Development Authority. The original owner of the land had made an application to the State of Gujarat for the release of the land. The Government was then pleased to release the land from reservation in the year 1991. Since then the land in question was not under reservation. The respondent No.2 is one of the emissaries of A.C.P., Shri Thakur. By this application, the petitioner has urged this court to exercise the powers under Section 482 and quash the complaint and cognizance taken by the learned Judicial Magistrate (FC) at Surat after the Umra police filed the charge etc.

4. Mr. P.G. Desai, learned Public Prosecutor submits that when the police has found a prima facie case during the course of investigation and chargesheet is already filed, it would not be just and proper on the part of this court to exercise the power under Section 482 and throttle the FIR and cognizance taken. The petitioner may be directed to approach the trial court for his discharge. When the remedy to seek discharge is available in law, the powers under Section 482 may not be exercised. Even otherwise also there is no justification to exercise the powers under Section 482 because reading the FIR as well as the police papers it appears that prima facie a case for proceeding further against the petitioner is made out. The petitioner is playing mischief so as to grab the land or properties by forging the documents or creating false power of attorney. He thereby also cheats the people executing the documents pretending to be the sale, but in the eye of law it is not the valid sale.

5. The opponent No.2 who is the complainant has appeared before this Court. He submits that he purchased the plot from the petitioner in 1990. In 1992 he decided to dispose the same of. He therefore contacted estate brokers. The broker studying his papers smelt a rat. He made him clear that the documents shown to him were not genuine and every thing was not clear. The title was also not clear. it would not therefore be possible for him to sell the plot. He realised that he was deluded. He thereafter met the petitioner for 100 to 125 times for getting the documents cleared and have a clear title. Every time the petitioner gave false promises, but lastly when he met the petitioner he was asked in threatening tone to leave Surat within a week, not to come again, and if at all he would, he would be kidnapped and murdered. He then contacted the SUDA who also made him clear that the documents were not genuine and title was not clear. He then thought that legal battle was the only way out. He then filed the complaint against mighty petitioner initially with Mahidharpura police station on 12th August 1998. Narrating his such woes & miseries he urges to dismiss the petition.

6. On the point, what is the yardstick for the exercise of powers, some of the authorities were cited at the bar. In the case of Madhavrao Jiwanji Rao Scindia & Anr. vs. Sambhajirao Chandrojirao Angre & Ors - AIR 1988 S.C. 709, the legal position is made clear. When the prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special features which appears in a particular case to consider whether it is expedient and in the interest of justice to permit the prosecution to continue. The court cannot be utilized for any oblique purpose. If the court finds that ultimately the chances of conviction are bleak and no useful purpose is likely to be served by allowing a criminal prosecution to continue the court may while taking into consideration the special facts of the case quash the proceeding even though the same may be at preliminary stage. The Supreme Court, when again the question about exercise of power was raised in the case of Mohinder Singh vs. Gulwant Singh & Ors - AIR 1992 S.C. 1894, has made it clear that it is not necessary for the High Court to go into the sufficiency of evidence for conviction of offence while holding that complaint did not contain the allegation about the offence. In Jayant Vitamins Ltd. vs. Chaitanyakumar and another AIR 1992 S.C. 1930, it is held that if the investigation of

the police is in progress, the court is not justified without any compelling or justifiable reason to interfere with the investigation, for investigating into the offence is a statutory function of the police and if the same is still on its way, quashing of the investigation by the High Court is not permissible. In the case of State of Maharashtra vs. Ishwar Piraji Kalpatri & Others - AIR 1996 SC 722, what is held is that complainant's complaint is guilty of malafides would not be a ground for quashing the same. The person may be inimical, but if the commission of offence is established, the prosecution cannot fail on the ground that there was an animus of the complainant or the prosecution against the accused. When again a question about quashing of the complaint arose before the Supreme Court in the case of State of H.P. Vs. Pirthi Chand and Anr. - 1996 (3) SCC (Cri). 210 making the law clear, it is emphasized much that the High Court should exercise the inherent powers only in rarest of rare cases. It should not weigh the pros and cons of the prosecution case and consider the effect of non-compliance of mandatory provisions of law. In cases of economic offences and offences involving moral turpitude or crimes of grave nature, greater circumspection and care and caution should be taken in mind by the High Court. In another case of Mushtaq Ahmed Vs. Mohd. Habibur Rehman Faizi & Ors. - (1996) (7) SCC 440, making the law clear it is laid down that if reading the complaint a prima facie case of cheating, breach of trust and forgery is clearly made out, the High Court would not be justified in quashing the complaint by considering rival versions and entering into debatable area of deciding which of the versions was true. About the use of the powers under Section 482, the question arose in the case of State of Bihar vs. Rajendra Agrawalla - (1996) 8 SCC 164. In that regard, it is made clear that the power should be exercised very sparingly and cautiously. The High Court has not to shift or appreciate the evidence and come to the conclusion that no prima facie case is made out. In another case of State of UP vs. O.P. Sharma - (1996) (7) SCC 705, reiterating the aforesaid principle, it is again made clear that High Court should be loath to interfere at the threshold so as to thwart the prosecution exercising its inherent powers under Section 482 of the Criminal Procedure Code or under Article 226 or 227 of the Constitution. If the FIR contains all the ingredients of the offence, interference of the High Court would be nothing but a grave error of law in quashing the FIR. In the case of Ashim Kumar Roy vs. Bipinbhai Vadilal Mehta & Others - (1998) 1 SCC 133, the exercise of the power in quashing the criminal proceeding was challenged. In that

connection, considering the facts and circumstances of the case, it is held that reading the FIR, when accepted in entirety if it does not constitute an offence, the continuance of criminal proceeding would manifestly be unjust. The proceedings were rightly quashed by the High Court. In the case of M/s. Pepsi Foods Ltd and another vs. Special Judicial Magistrate and others - AIR 1998 SC 128, it is made clear that the complaint and preliminary evidence when make out no case against the accused the complaint is liable to be quashed. In another case of Nagpur Steel & Alloys Pvt.Ltd vs.P. Radhakrishna @ Rajan & Others 1997 SCC (Criminal) 1073, it is held that if the allegation in the complaint and materials supplied along with the complaint prima facie show that there is a reason to believe about the commission of the offence, it would not be justified to quash the complaint only on the ground that the offence was committed during the course of commercial transaction. Whether the allegations in the complaint are true is to be decided on the basis of evidence led at the trial and not at the initial stage.

7. What can be deduced about the scope of enquiry, and exercise of powers is that the powers u/s. 482 are to be exercised sparingly and with circumspection and that too in the rarest of rare cases. It would not be just on my part to embark upon the enquiry as to the reliability or genuineness or otherwise of the allegations made in FIR or the complaint because extraordinary or inherent powers do not confer arbitrary jurisdiction on the Court to act according to its whim or caprice. If perusing the FIR or the complaint lodged and also the documents annexed therewith, it appears to the Court that prima facie the contents thereof constitute commission of one or another offence, it would not be just and proper on the part of this Court to exercise powers under Section 482 and quash the complaint or the FIR. But if the complaint and evidence collected make out no case prima facie against the accused, the same has to be quashed because in that case the valuable time of the Court should not be wasted for holding the trial only for the purpose of formally completing the same and to pronounce the judgment on the future date. Looking to such scope of enquiry, the averments in the complaint lodged and the documents and other papers if at all filed along with the complaint are to be perused for the purpose of ascertaining whether the contents thereof prima facie constitute commission of any of the offences. The facts if not set out in details, or if there is no clear mention about one or two ingredients of the offence, will not afford a justifiable ground to exercise the powers u/s. 482.

8. In view of such law, it is to be examined whether the FIR or the papers of the investigation filed in the Court along with the chargesheet make out a prima facie case giving rise to a reason to believe that any of the offences as alleged may have been committed and trial thereof is necessary. If the averments in FIR and facts on police papers do not prima facie constitute the essential requirements of the penal provision, it cannot form the foundation to proceed. So far as offence punishable under Section 506 Part 2, I.P.C. is concerned, in clear terms the case is advanced in FIR. When the respondent No.2 approached the petitioner for getting necessary clarification about the documents, and to know whether a clear title was vested in him the petitioner instead of dissipating and making the picture clear in threatening tone told that if he would not leave Surat city within a week, he (respondent No.2) would be kidnapped and murdered. Such allegation, made in the FIR against mighty petitioner who is interested to feather his own nest, reveals that a prima facie case about criminal intimidation is made out because threat given would cause alarm to respondent No.2, or cause him to do any act which he is legally not bound to do, or omit to do any act which he is legally entitled to do, as a means of avoiding the execution of such threat. It is also the case of the respondent No.2 that by forging the document a plot was sold to him making it clear that the title was clear and it was free from every encumbrance. The petitioner, according to respondent No.2, thereby committed the offence punishable under Section 405, 407, 402 and 406 of the Indian Penal Code. If a person makes false document either in its entirety or partly with intend to cause damage or injury to any person, or to cause any person to part with any property or to enter into any express or implied contract, or with intent to commit fraud a forgery can be said to have been committed. Reading the police papers and especially the further statement of respondent No.2 and the power of attorney executed by Muljibhai Valjibhai Patel, Paniben Dahyabhai, Dhirajbhai, Dineshbhai Dahyabhai, Bipinbhai Dahyabhai & others there is a reason to believe that essential requirements of penal provisions are present even at the initial stage. The land in question originally belonged to Muljibhai Valjibhai Patel, Paniben Dahyabhai, Dhirajbhai Dahyabhai, Dineshbhai Dahyabhai and Bipinchandra Dahyabhai. They had agreed to sell the land in question to the petitioner but before the sale could be effected some of the legal formalities were required to be undergone. They therefore as alleged executed the

power of attorney in favour of the petitioner and thereby they authorised the petitioner to do the required acts for effecting the sale in his favour finally. He was authorised to represent their case before any local body or any court or any forum. The sale deed executed by the present petitioner in the capacity of the power of attorney holder of the abovenamed original owner is dated 30th May 1990 wherein he has assured that the land in question was not under reservation and was free from any encumbrance. He has then signed for and on behalf of the owners. What is pertinent to note is that the power of attorney dated 15th April 1989 executed by the abovenamed persons in favour of the petitioner does not give the authority to the petitioner to sell the land to the third party. Though the petitioner was not vested with any authority or power to sell the land belonging to Muljibhai Veljibhai and others he sold the land in question to the present opponent No.2. It is the fact not in dispute that since 1989 the land was placed under reservation by the Government for SUDA issuing necessary notification, and it was dereserved in February 1991. On the day when the sale deed in favour of respondent No.2 was executed the land was under reservation. Still however the petitioner had the audacity to assure making necessary averment in the sale deed that the land was not placed in reservation and was free from any encumbrance. Such facts appearing in police papers at present prima facie constitute the offence of forgery. Though he had no authority he executed the sale deed, by executing the sale-deed made a false document, and the intention that can at this stage be obviously spelt out is to cause damage or injury to the respondent No.2. These facts prima facie show that the offences punishable under Sec.465 & 468 are committed by the petitioner for which he should be tried. However, the offence punishable under Sec. 471 is not even prima facie can be said to have been made out. A forged sale deed, as referred hereinabove, is alleged to have been executed in favour of respondent No.2. The said document is not fraudulently or dishonestly used as genuine anywhere, and no such case is alleged or is made out. The materials on police papers are silent about the making of the use of the document as genuine. Mr. Desai, the learned Public Prosecutor, when a query was made, failed to point out any thing from the materials on record constituting the offence punishable under Sec. 471, I.P. Code. He had to fairly state that case regarding offence u/s. 471 cannot be said to have been made out.

9. The opponent No.2 when realized that the documents were doubtful and no clear title had passed in

his favour, he often met the petitioner and requested him to make every thing good, but the petitioner who had already recovered the amount of consideration paid no heed initially under different pretexts, and later on gave aforesaid threat, which would prima facie show that the petitioner fraudulently or dishonestly though having no authority induced the respondent No.2 to deliver the amount of consideration to him which he would not have had he known that the title was doubtful or not clear, and in law he would acquire no title. Prima facie, the police papers therefore disclose essential ingredients of the offence of cheating made punishable under Sec. 420, Indian Penal Code. The above facts would also show that the petitioner was entrusted with the management of the land and was also put into the possession for necessary development, but was not authorised to dispose of the land. He however disposed of the land in favour of respondent No.2 and recovered the consideration for his own use. He thus converted that property to his own use and disposed of the plot dishonestly in violation of the terms & condition of entrustment & contract entered into with the original owners of the lands. The offence under Sec. 406 is, therefore, prima facie, appears to have been made out.

10. It is however the contention of Mr. Shethna, learned advocate representing the petitioner that Paniben Dahyabhai died on 21st June 1990 but Bipinbhai Dahyabhai made it clear in the statement that he had authorised the petitioner to sell the land or dispose the same of in any other manner which would show that the authority to sell was given to the present petitioner. The contention cannot gain a ground to stand upon. The power of attorney has to be read because the authority flows therefrom. As stated above no such authority appears to have been given by the executant of the power of attorney. Even if it is believed that later on Bipinchandra Dahyabhai gave the authority, others had not accordingly given the authority to the present petitioner. The sale effected is therefore not at all legal. In favour of the present petitioner, agreement to sell was executed. The law is clear that by agreement to sell the person in whose favour the agreement is executed does not acquire a title and the person who does not acquire a title cannot pass the better title than what he possesses in law. However, in this case the petitioner who was having no title suppressing the fact, executed the sale deed in favour of respondent No.2 and executed the sale deed. Under that sale deed therefore the respondent No.2 does not acquire any title. The petitioner has therefore in view of such clear facts at

present appears to have committed the offences as alleged, but of course not the one punishable under Section 471 as per the discussion hereinabove.

11. I will now switch over to the next contention raised by Mr. Desai, learned Public Prosecutor. Relying upon the decision of the Supreme Court in the case of Municipal Corporation of Delhi vs. Ram Kishan Rohtagi and Others - AIR 1983 SC 67 Mr. Desai has contended that when efficacious remedy under the Criminal Procedure Code is available this court may not exercise powers under Section 482. The police has in this case filed the chargesheet in the court of Judicial Magistrate (F.C.), Surat. It would then be proper for the petitioner to approach that court for his discharge.

12. No doubt as per the decision cited the powers under Sec. 482 are to be exercised only when no other remedy is available to the petitioner. Later on the Supreme Court has made the law further clear in the case of M/s. Pepsi Foods Ltd. & Anr. vs. Special Judicial Magistrate & Others - AIR 1998 S.C. 128. It is abundantly made clear that though the material on record is available justifying the quashing of the complaint, the High Court if refuses to quash on the ground that alternative remedy is available under the Code the same would not be proper. The Supreme Court has also made it clear in the case of Ashok Chaturvedi & Others vs. Shitul H. Chanchani & Anr. (1998) 7 S.C.C. 698 that merely because the accused has the right to plead at the time of framing of the charge that there is no material for framing the charge, he is not debarred from invoking the inherent jurisdiction of the High Court at the earliest point of time when the Magistrate has taken cognizance. In that case, the complaint was quashed though in that case chargesheet was filed and cognizance was taken. In view of these decisions, it would not be just & proper to direct the petitioner to appear before the Judicial Magistrate and pray for his discharge advancing his case. On this count therefore this application cannot, as submitted, be thrown overboard. However, it may be stated that for the aforesaid reasons the application is required to be partly allowed and partly refused.

13. For the aforesaid reasons, reading the FIR as well as the materials in police papers filed along with chargesheet in the court of Judicial Magistrate (F.C.) at Surat, it is clear that the facts in FIR & police papers without adding or subtracting anything prima facie disclose essential requirements of the penal provisions

namely Sec. 465, 468, 406, 420, 506(2) of the Indian Penal Code. The complaint and cognizance taken relating to these offences therefore cannot be quashed exercising power under Section 482. No case however relating to the offence punishable under Sec. 471 is made out, and so for quashing the charge so far as it relates to the offence punishable under Sec. 471, the application is required to be partly allowed.

14. In the result, the application is partly allowed. The FIR and cognizance taken relating to the offence punishable under Section 471, I.P.C., only are hereby quashed. Rule to the aforesaid extent is made absolute.

(rmr).